

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL STAR NATIONAL	)	
INSURANCE COMPANY,	)	
	)	Civil Action
Plaintiff,	)	
	)	
vs.	)	No. 03-CV-03625
	)	
PALMER TOWNSHIP,	)	
DONALD S. HIMMELREICH,	)	
VIRGINIA S. RICKERT,	)	
THEODORE BOREK,	)	
ROBERT LAMMI,	)	
JEFFREY YOUNG,	)	
ROBERT ELLIOTT,	)	
ROBERT WASSER,	)	
H. ROBERT DAWS,	)	
HEMSTREET, HIMMELREICH & NITCHKEY,	)	
and JOHN DOES,	)	
	)	
Defendants.	)	

\* \* \*

APPEARANCES:

FRANK C. SABATINO, ESQUIRE, and  
JO BENNETT, ESQUIRE,  
On behalf of plaintiffs

ANDREW N. HOWE, ESQUIRE,  
On behalf of defendant

\* \* \*

OPINION

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on the Motion for Summary Judgment, which motion was filed by plaintiff on March 19, 2004. For the reasons expressed below, we conclude that plaintiff is entitled to judgment as a matter of law on its

Complaint for Declaratory Judgment. Therefore, we grant plaintiff's motion.

#### PROCEDURAL BACKGROUND

This civil action arises from a dispute over plaintiff General Star National Insurance Company's ("GenStar") duty to indemnify or defend defendants in an underlying State court action pending in the Court of Common Pleas of Northampton County, Pennsylvania. On June 13, 2003 plaintiff filed a Complaint for Declaratory Judgment in this court seeking a declaration that it is not required to indemnify or defend defendants in the underlying State court action. On January 21, 2004 the Answer of Defendants was filed.

On March 19, 2004 plaintiff filed its Motion for Summary Judgment. On April 2, 2004 the Response of Defendants, Palmer Township, Virginia S. Rickert, Theodore Borek, Robert Lammi, Jeffrey Young, Robert Elliot, Robert Wasser, and H. Robert Daws in Opposition to Plaintiff's Motion for Summary Judgment and the Brief of Defendants, Palmer Township, Virginia S. Rickert, Theodore Borek, Robert Lammi, Jeffrey Young, Robert Elliot, Robert Wasser, and H. Robert Daws in Opposition to Plaintiff's Motion for Summary Judgment were filed.

Plaintiff argues, and defendants do not substantively dispute, that there are no disputes as to any material fact

precluding the entry of summary judgment in this matter. The sole issue raised in this case and at issue on this motion for summary judgment is whether, under the applicable insurance policy, plaintiff is obligated to continue to indemnify and defend defendants in the underlying State court action.

For the reasons which follow, we find that plaintiff is not obligated to indemnify or defend defendants in the underlying State court cause of action. Thus, we now grant plaintiff's motion for summary judgment.

#### STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment shall be rendered where it is shown that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c); accord Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1102 (3d Cir. 1996). Plaintiff argues and defendants do not substantively contest that there are no genuine issues of material fact. Below, we address whether plaintiff is entitled to judgment as a matter of law.

### FINDINGS OF FACT

Based upon the pleadings, record papers, depositions and exhibits of the parties, the undersigned makes the following findings of fact:

1. GenStar provides public officials and employment practices liability insurance on a claims-made basis to the Pennsylvania Municipal Insurance Program pursuant to Master Policy #NYA602601.<sup>1</sup>

2. Defendant Palmer Township holds Certificate #45 (the "Policy") under the Master Policy.<sup>2</sup>

3. The Policy generally provides indemnity and defense to Palmer Township for any claim made against the Township for "wrongful acts".<sup>3</sup>

4. Indemnity coverage is provided in the amount of \$1,000,000.00 per claim and \$3,000,000.00 in the aggregate.<sup>4</sup>

5. The Policy also provides coverage to "lawfully elected, appointed or employed officials", "lawfully appointed members of the commissions, boards or other units of the" Township, and the Township's employees.<sup>5</sup>

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<sup>1</sup> Master Policy #602601 ("Master Policy"), attached to Affidavit of Scott A. Rohr ("Rohr Aff."), Exhibit B to Statement of Facts ("Plaintiff's Statement") filed by plaintiff on March 19, 2004.

<sup>2</sup> Certificate #45 ("Policy"), attached to Rohr Aff.

<sup>3</sup> Policy.

<sup>4</sup> Public Officials and Employment Practices Liability Declarations, attached to Rohr Aff.

<sup>5</sup> Policy at 6.

6. The Policy provides in pertinent part:

SECTION I - COVERAGES

COVERAGE A. PUBLIC OFFICIALS IMMUNITY

1. Insuring Agreement.

a) We will pay those sums that the insured becomes legally obligated to pay as damages resulting from CLAIMS, to which this insurance applies, against the insured by reason of PUBLIC OFFICIALS WRONGFUL ACT(S) rendered in discharging duties on behalf of the public entity named in the Declarations. No other obligations or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B. This insurance does not apply to PUBLIC OFFICIALS WRONGFUL ACT(S) which occurred before the Retroactive Date, if any, shown in the Declarations or which occur after the POLICY PERIOD. We will have the right and duty to defend any SUIT seeking those damages. But:

\* \* \*

2. Exclusions.

This insurance does not apply to any CLAIM made against the insured:

\* \* \*

d) For any damage arising from bodily injury, sickness, disease or death of any person, or for damages to or destruction of any property, including diminution of value or loss of use.

\* \* \*

e) For false arrest, false imprisonment, libel, slander, defamation, invasion of privacy, wrongful eviction, assault, battery,

malicious prosecution, or abuse of process by any insured.<sup>6</sup>

7. On January 13, 2000 Eileen Cowell, Richard Cowell, Sylvester Pany and Eastgate Land Development Corporation (the "Cowell Plaintiffs") filed a Complaint against defendants Palmer Township, Donald S. Himmelreich, Virginia S. Rickert, Theodore Borek, Robert Lammi, Jeffrey Young, Robert Elliott, Robert Wasser, H. Robert Daws, Hemstreet, Himmelreich & Nitchkey and unnamed individuals designated as John Does in the Court of Common Pleas of Lehigh County, Pennsylvania at docket number 2000-CV-0079 (the "Underlying Action"). On March 28, 2000 the Cowell Plaintiffs filed an Amended Complaint ("Underlying Amended Complaint").<sup>7</sup>

8. The Underlying Amended Complaint alleges that: (1) the Cowell Plaintiffs were the owners and controllers of certain real estate in Palmer Township (the "Real Estate"); (2) the Cowell Plaintiffs desired to develop the Real Estate for commercial purposes; and (3) defendants denied the Cowell Plaintiffs the opportunity to develop or use the Real Estate in the manner in which they desired.<sup>8</sup>

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<sup>6</sup> Policy at 1-2.

<sup>7</sup> Amended Complaint ("Underlying Amended Complaint"), Exhibit A to the Complaint for Declaratory Judgment, filed by plaintiff on June 13, 2003.

<sup>8</sup> Underlying Amended Complaint.

9. By Order dated July 25, 2000 Lehigh County Common Pleas Judge Alan M. Black transferred the Underlying Action to the Court of Common Pleas of Northampton County, Pennsylvania at docket number C0048-CV-2000-007604.<sup>9</sup>

10. By Order dated December 27, 2001 Northampton County Common Pleas Judge William F. Moran dismissed Counts I through III, Count V, Count VIII and Count IX from the Underlying Amended Complaint, while maintaining Counts IV ("Interference with Prospective and Current Contractual Relations"), VI ("Abuse of Process") and VII ("Wrongful Use of Civil Proceedings Pursuant to 42 Pa.C.S.A. § 8351").<sup>10</sup>

#### CONCLUSIONS OF LAW

Applying the summary judgment standard to the issues presented by the parties, we make the following conclusions of law:

1. The relevant language of the following Policy exclusions is clear and unambiguous:

2. Exclusions.

This insurance does not apply to  
any CLAIM made against the insured:

\* \* \*

d) For any damage arising from bodily

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<sup>9</sup> Order dated July 25, 2000, Exhibit D to Plaintiff's Statement.

<sup>10</sup> Order of Court, dated December 27, 2001, Exhibit E to Plaintiff's Statement.

injury, sickness, disease or death of any person, or for damages to or destruction of any property, including diminution of value or loss of use.

\* \* \*

e) For false arrest, false imprisonment, libel, slander, defamation, invasion of privacy, wrongful eviction, assault, battery, malicious prosecution, or abuse of process by any insured.<sup>11</sup>

2. The claims raised in Count IV of the Underlying Amended Complaint are excluded from coverage by Section I.A.2.d of the Policy.

3. The term "any property" as used in Section I.A.2.d of the Policy includes both tangible and intangible property.

4. The claims raised in Count VI of the Underlying Amended Complaint are excluded from coverage by Section I.A.2.e of the Policy.

5. The phrase "abuse of process" as used in Section I.A.2.e of the Policy includes the initiation and continuation of such proceedings.

6. The claims raised in Count VII of the Underlying Amended Complaint are excluded from coverage by Section I.A.2.e of the Policy.

7. The term "malicious prosecution" as used in Section I.A.2.e of the Policy refers also to the wrongful use of civil proceedings.

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<sup>11</sup> Policy at 1-2.



8. Plaintiff is not obligated to indemnify or defend defendants in the Underlying Action.

#### DISCUSSION

The only issue in dispute in this action is whether, under the Policy, plaintiff is obligated to continue to indemnify and defend defendants in the Underlying Action. For the reasons stated below, we find that plaintiff is not obligated to continue to indemnify and defend defendants in the Underlying Action.

In support of its argument that it is not obligated to defend or indemnify defendants in the Underlying Action, plaintiff argues that the Policy exclusions specifically exclude coverage of the three remaining counts against defendants. More particularly, plaintiff argues that the Cowell Plaintiffs' claims against defendants: 1) in Count IV for "Interference with Prospective and Current Contractual Relations" is excluded as a claim for diminution in value; 2) in Count VI for "Abuse of Process" is expressly excluded from coverage; and 3) in Count VII for "Wrongful Use of Civil Proceedings Pursuant to 42 Pa.C.S.A. § 8351" is excluded as a claim for malicious prosecution.

Defendants do not dispute that the Policy excludes coverage for claims for diminution of value, abuse of process or malicious prosecution. However, defendants argue that: 1) the diminution of value exclusion applies only where there is physical property damage, and not to economic losses; 2) the

abuse of process exclusion does not apply because Count VI is actually a claim for malicious use of process; and 3) the malicious prosecution exclusion does not apply because Count VII is not a claim for malicious prosecution.

To settle this dispute, we must determine whether the Policy exclusions preclude coverage to defendants in the Underlying Action. The duty to defend arises whenever a complaint alleges claims which may potentially fall within the scope of coverage of the policy. International Insurance Company v. St. Paul Fire & Marine Insurance Company, Nos. 86-CV-4438, 86-CV-7011, 1988 U.S. Dist. LEXIS 12215, at \*11 (E.D. Pa. October 24, 1988). The insurer must defend an insured if the allegations of a complaint "state on their face a claim against the insured to which the policy potentially applies." C.H. Heist Caribe Corporation v. American Home Insurance Company, 640 F.2d 479, 483 (3d Cir. 1981). Additionally, an insurer is obligated to defend an insured on all claims of a multi-count complaint even though only a single claim requiring coverage remains. International, 1988 U.S. Dist. LEXIS 12215, at \*11-12.

Initially, we must determine whether the Policy exclusions at issue in this action are ambiguous. "The determination of whether a contract term is clear or ambiguous is a pure question of law[.]" Teamsters Industrial Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc., 989 F.2d 132, 135 (3d Cir. 1993). A term is ambiguous if reasonably intelligent

persons would "honestly differ as to its meaning when considering it in the context of the entire policy." Allstate Insurance Company v. Sheridan, 82 Fed. Appx. 777, 779 (3d Cir. 2003). Ambiguous terms are to be strictly construed against the insurer. ACandS, Inc. v. Aetna Casualty and Surety Company, 764 F.2d 968, 973 (3d Cir. 1985).

The policy exclusions at issue in this case provide:

2. Exclusions.

This insurance does not apply to any CLAIM made against the insured:

\* \* \*

d) For any damage arising from bodily injury, sickness, disease or death of any person, or for damages to or destruction of any property, including diminution of value or loss of use.

\* \* \*

e) For false arrest, false imprisonment, libel, slander, defamation, invasion of privacy, wrongful eviction, assault, battery, malicious prosecution, or abuse of process by any insured.<sup>12</sup>

Because we find no ambiguity in the language of these exclusions, we give effect to the plain meaning of such language in interpreting these exclusions. See Northern Insurance Company of New York v. Aardvark Associates, Inc., 942 F.2d 189, 196 (3d Cir. 1991).

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<sup>12</sup> Policy at 2.

For the reasons explained below, we find that the plain meaning of the Policy exclusions at issue in the instant case excludes Counts IV, VI and VII of the Underlying Amended Complaint. Therefore, plaintiff is not required to defend defendants in the Underlying Action.

I. Count IV - Interference with Prospective and Current Contractual Relations

Plaintiff argues that Count IV of the Underlying Amended Complaint is excluded from Policy coverage because it alleges a claim for "diminution of value". For the reasons explained below, we agree. Therefore, plaintiff has no duty to defend or indemnify defendants in the Underlying Action.

The relevant exclusion clause of the Policy in this case excludes coverage "[f]or any damage arising from bodily injury, sickness, disease or death of any person, or for damages to or destruction of any property, including diminution of value or loss of use."<sup>13</sup> Because the exclusion clearly and unambiguously refers to "any property" and does not include any limiting terms such as "tangible property", we find that this language unambiguously excludes from coverage claims for the damage or destruction of tangible and intangible property. Cf. TIG Insurance Company v. Nobel Learning Communities, Inc., No. 01-CV-4708, 2002 U.S. Dist. LEXIS 10870, at \*18-20 (E.D. Pa.

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<sup>13</sup> Policy at 2.

June 18, 2002) (finding that underlying claim for copyright infringement was not covered because coverage provision specified "tangible property").

Looking to the Underlying Amended Complaint, we find that Count IV potentially states a claim for the diminution in value of the Cowell Plaintiffs' contract rights as well as the Real Property involved. While the Cowell Plaintiffs' contract rights are intangible property and their Real Property is tangible, we find that they both constitute "any property" as the term is used in the exclusion. Thus, the Cowell Plaintiffs' claim for the diminution of value of their tangible and intangible property is excluded from coverage. Therefore, plaintiff is not required to indemnify or defend defendants concerning Count IV of the Underlying Action.

## II. Count VI - Abuse of Process

In its motion, plaintiff argues that Count VI of the Underlying Amended Complaint titled "Abuse of Process" is expressly excluded from coverage. Defendants counter that Count VI actually alleges both the malicious use of civil proceedings and abuse of process. They argue further that the Policy excludes only claims for abuse of process and not malicious use of civil proceedings. We agree with plaintiff.

As explained above, we find that the terms used in the relevant policy exclusions are clear and unambiguous. Thus we

give effect to the plain meaning of those terms. Specifically, we find that reasonably intelligent individuals considering the phrase "abuse of process" in the context of the entire Policy would not disagree that the phrase applies to both claims for abuse of process and malicious use of civil proceedings.

Reasonably intelligent people would not understand the phrase "abuse of process" when read in context to mean that a claim that a public official maliciously initiated civil proceedings is covered by the Policy, but that a claim that the official continued in those proceedings after their initiation is excluded from coverage. Such a distinction can only be made in a hypertechnical analysis by attorneys who could find ambiguity in any term.

Thus, we will give effect to the plain meaning of the phrase "abuse of process", which reasonably intelligent people would agree includes both the initiation and continuation of wrongful civil proceedings. Therefore, we find that the allegations contained in Count VI of the Underlying Amended Complaint are excluded from coverage under the Policy.

### III. Count VII - Wrongful Use of Civil Proceedings Pursuant to 42 Pa.C.S.A. § 8351

Plaintiff argues that Count VII of the Underlying Amended Complaint entitled "Wrongful Use of Civil Proceedings Pursuant to 42 Pa.C.S.A. § 8351" is excluded from coverage under

the Policy as a claim for malicious prosecution. Defendants disagree, noting that wrongful use of civil proceedings is a cause of action distinct from a claim for malicious prosecution. Specifically, defendants argue that a claim of wrongful use of civil proceedings concerns the initiation of a civil proceeding, while a claim for malicious prosecution concerns the initiation of a criminal proceeding. We disagree.

The distinction between a claim for malicious prosecution and wrongful use of civil proceedings is simply that the former is a common law claim and the latter is statutory. The Superior Court of Pennsylvania stated that "[t]he common law tort of malicious prosecution has been codified as a statutory cause of action - Wrongful Use of Civil Proceedings, 42 Pa.C.S.A. §§ 8351-54." Consulting Engineers, Inc. v. Insurance Company of North America, 710 A.2d 82, 85 n.4 (Pa. Super. 1998) (holding that insurance policies which provided coverage for claims of malicious prosecution covered claims for wrongful use of civil proceedings).

Because claims for wrongful use of civil proceedings are treated by Pennsylvania courts as included in policy descriptions of malicious prosecution, we find that Count VII of the Underlying Complaint which alleges a statutory claim for wrongful use of civil proceedings is encompassed by the exclusion of claims for malicious prosecution. Therefore, we find that plaintiff is not required to defend or indemnify defendants

concerning Count VII of the Underlying Amended Complaint.

CONCLUSION

For all the foregoing reasons, we grant plaintiff's motion for summary judgment and enter judgment in favor of plaintiff on its Complaint for Declaratory Judgment.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL STAR NATIONAL	)	
INSURANCE COMPANY,	)	
	)	Civil Action
Plaintiff,	)	
	)	
vs.	)	No. 03-CV-03625
	)	
PALMER TOWNSHIP,	)	
DONALD S. HIMMELREICH,	)	
VIRGINIA S. RICKERT,	)	
THEODORE BOREK,	)	
ROBERT LAMMI,	)	
JEFFREY YOUNG,	)	
ROBERT ELLIOTT,	)	
ROBERT WASSER,	)	
H. ROBERT DAWS,	)	
HEMSTREET, HIMMELREICH & NITCHKEY,	)	
and JOHN DOES,	)	
	)	
Defendants.	)	

O R D E R

NOW, this 25<sup>th</sup> day of May 2004, upon consideration of the Motion for Summary Judgment, which motion was filed by plaintiff on March 19, 2004; and the Response of Defendants, Palmer Township, Virginia S. Rickert, Theodore Borek, Robert Lammi, Jeffrey Young, Robert Elliot, Robert Wasser, and H. Robert Daws in Opposition to Plaintiff's Motion for Summary Judgment, as well as the Brief of Defendants, Palmer Township, Virginia S. Rickert, Theodore Borek, Robert Lammi, Jeffrey Young, Robert Elliot, Robert Wasser, and H. Robert Daws in Opposition to Plaintiff's Motion for Summary Judgment, which response and brief were filed on April 2, 2004; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that plaintiff's motion is granted.

IT IS FURTHER ORDERED that judgment is entered in favor of plaintiff and against defendants on plaintiff's Complaint for Declaratory Judgment.<sup>14</sup> We declare that plaintiff is not obligated to indemnify or defend defendants in the underlying State court action styled Cowell, et al. v. Palmer Township, et al., docket number C0048-CV-2000-007604 in the Court of Common Pleas of Northampton County, Pennsylvania.

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<sup>14</sup> Defendants Donald S. Himmelreich and Hemstreet, Himmelreich & Nitchkey (the "Himmelreich Defendants") did not join the remaining defendants in opposing the Motion for Summary Judgment. They are nonetheless bound by this Order because, by Order dated April 6, 2004, the court approved a Stipulation of the Parties by which the Himmelreich defendants agreed to be bound by the court's ultimate ruling on plaintiff's Complaint for Declaratory Judgment.

BY THE COURT:

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James Knoll Gardner

United States District Judge